United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1874

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P/S

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

* * * *

SUSAN ROE, ET AL
Plaintiffs,Appelless

VS.

NICHOLAS NORTON, ET AL
Defendants,Appellants

BRIEF OF APPELLEE

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ISSUES PRESENTED

I. DOES THE UNITED STATES SOCIAL SECURITY ACT PROVIDE PAYMENT FOR ABORTION SERVICES WHETHER OR NOT SAID SERVICES ARE NECESSARY FOR THE PHYSICAL OR MENTAL HEALTH OF THE PATIENT?

II. DOES THE UNITED STATES SOCIAL SECURITY ACT REQUIRE PAYMENT FOR ABORTION SERVICES BY STATE MEDICAL ASSISTANCE PROGRAMS?

III. DOES THE DENIAL OF MEDICAID REIMBURSEMENT FOR ABORTION DENY RECIPIENTS' THEIR RIGHT TO PERSONAL PRIVACY AND LIBERTY?

IV. DOES THE DENIAL OF MEDICAID PAYMENT FOR ABORTION DENY INDIGENT WOMEN THE EQUAL PROTECTION OF THE LAW?

V. IS A THREE-JUDGE COURT REQUIRED TO ENJOIN A STATE REGULATION DENYING MEDICAID PAYMENT FOR ELECTIVE ABORTION WHEN PRIOR DECISIONS OF THE UNITED STATES SUPREME COURT RENDER SAID REGULATION UNCONSTITUTIONAL?

STATEMENT OF THE CASE

The Appellee accepts and adopts the Appellant's Statement of the Case.

STATEMENT OF FACTS

Both plaintiffs in this action are women who are recipients of public assistance from the State of Connecticut in the form of Aid to Families With Dependent Children (AFDC) and Medical Assistance, or Medicaid. Plaintiff Poe was sixteen years old and a high school junior when she became pregnant in September, 1973. She desired an abortion so that she could complete high school, obtain a job, and terminate her dependence on public assistance. (See Affidavit in Support of Motion for Temporary Restraining Order, A. 21). She underwent an abortion at Park City Hospital in Bridgeport, Connecticut, but the State Welfare Department refused to authorize medicaid payment for that procedure. Plaintiff Roe was pregnant at the time this action was filed. She was unmarried and the mother of three children. One of these was a six month old boy who was in poor health. He

required careful supervision and became ill very easily, and Ms. Roe did not want to bear another child at that time. (See Affidavit in Support of Motion for Temporary Restraining Order, A.22). The District Court issued a Temporary Restraining Order enjoining the State Welfare Department from refusing payment for her abortion, which was subsequently performed at Park City Hospital.

Abortion is a generally available medical procedure throughout Connecticut, at least during the first two trimesters of pregnancy. Connecticut Department of Health, Reg. §19-13-D54. 1/

However, prior to the filing of this action, the Connecticut Welfare Department refused to make medicaid vendor payments for abortions that were not "medically necessary for the patient's health". To obtain medicaid payment for an abortion a provider of services must submit a request for prior authorization (Form W-601) to the Chief of Medical

1/ A three-judge district court declared Connecticut's criminal laws prohibiting abortion unconstitutional in ABELE V. MARKLE, 342 F. Supp. 800 (D. Conn. 1972) rem. 410 U.S. 951 (1973) dec. on rem. 369 F. Supp. 807 (D. Conn. 1973).

Services of the Welfare Department, defendant David Galinsky. This request for prior authorization must be accompanied by a written attestation of medical necessity signed by the attending physician and the Chief of Obstetrics and Gynecology of the hospital where the abortion is to be performed. The current Connecticut Regulation on abortion, State Welfare Department Manual Vol. 3 Ch. III §275, is reprinted in full in the joint appendix, p. 30. The relevant language provides:

> An abortion may be performed on a patient only when medically necessary and after the legal consent to such procedure has been obtained.
>
> Therapeutic abortion services within the State are covered under Title XIX when all the following conditions are met:
>
> 1. The abortion is recommended as medically or psychiatrically necessary by the attending physician and the Chief of Obstetrics and Gynecology in accredited hospitals.
>
> 2. The written consent for the abortion is secured from the patient or her conservator, and in the case of a minor, from the parent or guardian.
>
> . . .

The attestation of medical necessity must be submitted on the following form:

State Welfare Department
1000 Asylum Avenue
Hartford, Connecticut
Attention:

Dear

I hereby certify that (name of patient) has requested performance of an abortion. As attending physician it is my opinion that performance of this abortion is medically necessary for the patient's health.

_____
Signature of Attending Physician

_____
Attest-Chief of Obst/Gyn

The prior authorization request, Form W-601, must likewise include "a statement indicating the medical or psychiatric need for the abortion." The regulation maintains use of the term "therapeutic abortion services", a phrase traditionally referring to an abortion necessary to avoid certain predictable physical or psychiatric ill-effects of a full term pregnancy, as opposed to an "elective abortion", which refers to an abortion chosen by a woman simply because

she does not want to bear a child. The distinction between the terms has been virtually eliminated by the Supreme Court in ROE V. WADE, 410 U.S. 113 (1973).

Defendants in their brief, do not define medical necessity, and therefore would have the court believe that there is nothing restrictive or unusual in this requirement. However, it is clear from the regulation and its manner of enforcement that medical necessity in this context means substantially more than the existence of an unwanted pregnancy. As the District Court defined the term (and defendants make no objection to that definition)

> ". . .they [the defendants] appear to mean that without the abortion the women's physical or psychiatric health will suffer." (A. 42)

Neither of the plaintiffs herein came within this requirement. Plaintiff Roe's physician, Dr. James Kauders, did not submit an attestation of medical necessity, because "[He did] not believe [an abortion] is medically necessary in the sense that her life or health will be threatened if the abortion is not performed." (Affidavit in Support of Motion for Temporary Restraining Order, A. 18). Dr. Joseph Horowitz,

the Chief of Obstetrics and Gynecology at Park City Hospital does not certify that an abortion is necessary for the patient's health unless

> "The" attending physician believes there will be an adverse effect upon the physical or mental condition of the patient if a pregnancy is carried to term.
>
> "When such an adverse effect is not predicted, but a patient determines that for personal reasons she does not wish to bear a child, I cannot attest that an abortion is medically necessary for that patient's health, without committing a violation of my professional ethics." Affidavit in Support of Motion for Summary Judgment, A. 37.

The effect of the regulation, as to these plaintiffs and the class they represent, is to deny them the right to an abortion, even though their physicians determine that this procedure is warranted.

There is no other medical service for which the defendants require an attestation of medical necessity signed by the Chief of Service or by any doctor other than the attending physician. (Ans. to Plaintiffs' Interrog. 9B, A.26). Prior authorization is required only for certain

services, which involve long term treatment, are extremely costly, or are rehabilitative or custodial in nature. 2/

2/ (1). Dental care other than emergency care or routine low-cost care in a state-aided hospital clinic. Manual Vol. 3 Ch. III §215.

(2) Drugs costing over $10.00 and certain multi-vitamins. Manual §217.2(3).

(3) Prosthetic, surgical and orthopedic appliances and sickroom supplies costing over $5.00. Manual §220.11.

(4) Hearing aids and aural rehabilitation. Manual §222.

(5) Non-emergency transportation by ambulance, chaicar or taxi. Manual §223.

(6) Day treatment services. Manual §265.

(7) Certain services for the mentally retarded. Manual §270.03.

(8) Certain unusual optometric services. Manual §280.

(9) Podiatry services. Manual §280.1.

(10) Physical therapy services. Manual §282.

(11) Public health nursing services. Manual §228.12.

(12) Home Health Aid Services, over 12 hours a week. Manual §229.13.

(13) Hemodialysis. Manual §230.

(14) Psychological tests and treatment and diagnostic services. Manual §252.

(15) Care in certain voluntary non-profit clinics. Manual §253.

(16) Special nursing services. Manual §301.43.

(17) Out-of-State Hospitalization. Manual §302.

(18) Certain private psychiatric treatment. Manual §315.

(19) The following physicians' services:

Psychiatric services	Physical therapy
Audiological services	Hemodialysis
Orthopedic treatment	
Special Procedures:	
Transplant operations	Chemotherapy
Cosmetic or Reconstructive surgery	

Visits to nursing homes except for routine monthly check-ups and acute emergency calls.

Out-of-State service and procedures. Manual §281.

(20) Hospital care beyond ten days. Manual §301.1

Prior authorization is not required for any service comparable to abortion: not for any hospital procedure requiring a stay of less than ten days; not for any surgical procedures except transplant and cosmetic surgery, which are understandably sui generis; and not for any other obstetrical or gynecological service. In their answers to interrogatories defendants claim that prior authorization is required for a tubal ligation, (Answer to Interrog. 10A.4, A.27), but this requirement is not documented in any of the regulations furnished in response to said interrogatories. (Answer to Interrog. 10D).

Abortion is thus singled out from all other comparable medical procedures, is subjected to unique and burdensome administrative requirements and is denied entirely except in cases where State officials determine it is morally warranted.

The Court below ruled that this exclusion of abortion from the medicaid program violated the United States Social Security Act, 42 U.S.C. 1396 et seq. Plaintiffs also argued below that the defendants were in violation of the United States Constitution, and that a three judge court was not required to rule on this since there could be no substantial

question as to the constitutionality of the regulations in light of ROE V. WADE, 410 U.S. 113 (1973) and DOE V. BOLTON, 410 U.S. 179 (1973). The main portion of this brief will be concerned with the statutory issue on which the District Court's opinion is based. Appellees will also, however, discuss the constitutional arguments as they have bearing on the issue of statutory construction and as they are available as an alternative ground for this Court's decision.

ARGUMENT

I. THE UNITED STATES SOCIAL SECURITY ACT PROVIDES REIMBURSEMENT FOR ALL ABORTIONS, INCLUDING THOSE WHICH ARE NOT ESSENTIAL TO THE PHYSICAL OR MENTAL HEALTH OF THE RECIPIENT.

The defendants' brief is devoted to the argument that their abortion regulations are imposed upon the state by Title XIX of the Social Security Act. Defendants argue that the act, 42 U.S.C. §1396 et seq., would not permit payment for procedures which are not medically necessary, and that they are merely taking steps to assure that payment

is not made for unnecessary care. 3/

The only references to reasonable and necessary care which defendants are able to cite relate to Title XVIII of the Social Security Act, which deals with medicare, or medical insurance for the aged. While attention to that Title may be warranted in a question of statutory interpretation, sections of the medicare statute may not be taken literally as limitations on the scope of coverage of Title XIX. In the latter, the states are required to provide simply "medical services." The term necessary appears in the introductory section:

> "For the purpose of enabling each State, as far as practicable under the conditions in such State, to furnish (1) medical assistance on behalf of families with dependent children and of aged, blind or disabled individuals, whose income and resources are insufficient to meet the costs of necessary medical services, and (2) rehabilitation or other services to help such families and individuals attain or retain capability for independence or self-care, there is hereby authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this sub-chapter." 42 U.S.C. §1396.

3/ Specifically defendants claim that the State would not receive its federal share of the cost of abortion services if it provided such services in violation of the Social Security Act. Nothing in the Act prevents the State from offering this service at its own expense.

and in a similar context in §1396a(a)(10)(B)(i).

As the District Court noted:

> "In Title XIX, the phrase appears only as a limitation on persons eligible for medicaid payments. . . But the assistance to be made available to those who are eligible is always described simply as 'medical assistance' without the adjective 'necessary.' " (A. 44). 4/

However, assuming, arguendo, that the defendants are correct in reading a requirement of medical necessity into Title XIX, that fact sheds virtually no light on the validity of defendants' policies with regard to abortion. What is completely absent from defendants' brief is the fact that defendants' regulations do not simply require a showing of medical necessity: that could be demonstrated by a physician's statement as to the patient's condition and his opinion that the procedure is the proper means of treating that condition.

4/ Plaintiffs respectfully disagree with the assumption that Congress would not provide broader benefits to the indigent than to purchasers of coverage under Medicare. Medicaid provides payments to the indigent aged for services they cannot afford and which are not covered by Medicare. Medicaid is designed for those who cannot afford adequate medical care; it therefore provides broader coverage than medicare, which as a program assumes some ability to pay on behalf of recipients.

This is the procedure followed in all other cases of reimbursement for physicians' services.

Defendants have instead made a moral judgment that some abortions are worthy of reimbursement and others are not. One need not engage in "political speculation" or rely on "lingering suspicion", see Brief for Appellant, p. 11 fn. 3, to see that defendants are subjecting indigents to controls not permissible as to the general population. Devoid of its philosophical or moral context, it is impossible to conceive of an unnecessary abortion.

KLEIN V. NASSAU COUNTY MEDICAL CENTER, 347 F. Supp. 496 (1972) squarely met the argument that abortion services are not a "necessary" service under Title XIX.

> "Pregnancy is a condition which in today's society is universally treated as requiring medical care, prenatal, obstetrical and post-partum care, and undeniably it is provided under the medicaid program as "necessary" medical assistance although pregnancy is not an abnormal condition nor does the medical assistance in childbirth "cure" it. Medical assistance for abortion is not less "necessary" because an election to bear the child would obviate that medical assistance and require instead other, more extensive and more expensive medical assistance." 347 F. Supp. at 500.

This was essentially the reasoning of the District Court in the instant case. There was no question that the abortions performed upon both plaintiffs were medically necessary to terminate their unwanted pregnancies.

> These plaintiffs had a physical condition that plainly required the rendering of medical service. The condition was pregnancy. The choice of service, whether childbirth or abortion, was a matter between patient and physician. Either service is equally eligible for medicaid payment. The defendants do not contend that the expenses of childbirth are not necessary even though the patient could have elected an abortion. By the same token, the expenses of an abortion are no less necessary simply because the patient could have elected childbirth. Defendants do not suggest that the abortion alternative is more costly than childbirth. (A. 46).

Defendants argue extensively that Title XIX, as well as Title XVIII, require the physician's decision to be paramount in determining covered services. (Brief for Appellant, pp. 8-9). Presumably defendants' regulations are designed to insure that the physician believes the abortion is a necessary medical service. (Brief for Appellant. p.11). Nowhere, however, do defendants explain why such safeguards are not required for any other comparable medical procedure. For all other types of physicians'

services, only the attending physician need certify the reasons for a claim for reimbursement. He does so after service is rendered, when he submits his bill for payment. For an abortion, two physicians must certify that the procedure is necessary for the patient's health. In addition, the attending physician must submit a request for prior approval, and a third party, within the Welfare Department, reviews this decision. Thus according to defendants' own brief this regulation violates the Social Security Act. It is also patently contrary to the Supreme Court's holding in DOE V. BOLTON, Supra. There the Court ruled that a state may not require approval of anyone except the patient's attending physician and the patient herself in making the abortion decision. 410 U.S at 199-200.

In the case at bar it is not true that the plaintiffs' attending physicians would not certify that their abortions were necessary medical procedures. Both plaintiffs' physicians submitted applications for payment indicating that they had approved the procedures as necessary to terminate the pregnancy in the safest way possible for their patients. Dr. James Kauders stated by affidavit that:

> Ms. Roe's abortion is a medically appropriate procedure given her present condition. I do

> not believe it is medically necessary in the sense that her life or health will be threatened if the abortion is not performed. (A. 19).

Dr. Horowitz directed himself precisely to this point in his Affidavit in Support of Plaintiff's Motion for Summary Judgment:

> "8. It is my professional opinion that the term 'medically necessary for the patient's health' refers to situations in which the attending physician believes there will be an adverse affect upon the physical or mental condition of the patient if a pregnancy is carried to term.
>
> 9. When such an adverse affect is not predicted, but a patient determines that for personal reasons she does not wish to bear a child, I cannot attest that an abortion is medically necessary for that patient's health, without committing a violation of my professional ethics.
>
> 10. An abortion in such circumstances is, of course, medically necessary in order to terminate an unwanted pregnancy, in the same sense as other forms of obstetrical care are medically necessary when a patient decides to carry a pregnancy to term."

Perhaps the most persuasive evidence that Title XIX does not prohibit payment for plaintiffs' abortions comes from the Congress of the United States and the Department of Health, Education and Welfare, the agency charged with administering the Social Security Act. In recent weeks both

the Senate and the House of Representatives voted on an amendment to H.R. 15580, a HEW appropriations bill, that would bar HEW funds from use to pay for abortions not necessary to preserve the life of the mother.

The very fact that such an amendment was offered is evidence that in Congress' view Title XIX as now constituted does provide payment for abortion.

Even if Title XIX did not absolutely mandate provision of abortion services by the States, the Department of Health, Education and Welfare has always provided federal reimbursement in whatever amount the state is entitled to, for any abortion services the states chose to provide. There has never been any special administrative or substantive requirement imposed on such payments.

Under 42 U.S.C. §1396b, the Secretary of Health, Education and Welfare pays to the states a certain percentage of their expenditures for medical assistance. In Connecticut this "federal share" of medicaid payments is approximately 50%. (Defs.' Answers to Interrog. No. 21F). The percentage is much higher for certain other expenditures and HEW pays 90% of family planning services. 42 U.S.C. §1396b (a) (5).

The Medical Services Administration, the HEW unit which administers medicaid, has consistently advised states

that it will pay for any abortion performed for an eligible medicaid recipient.

> "The following statement may be used to describe M.S.A.'s policy on abortions: The position taken by M.S.A. on abortions is that the Social Security Act and the HEW regulations provide for federal matching of state expenditures for all kinds of medical care and services, including patient and hospital services (sic), outpatient hospital services, physician services, drugs, etc. If the State Medicaid program paid for these services whether for abortion or any other medical services, the Federal Government shared the cost with the state." Letter from Pennsylvania Attorney General cited in DOE V. WOHLGEMUTH, 376 F. Supp. 173 178-9 fn. 5 (W.D. Pa. 1974).

Counsel for plaintiffs inquired directly of H.E.W. as to their policy regarding abortion and the reply of the Medical Services Administration, confirms this view:

> "You are correct in stating that 'under Title XIX, federal financial participation is available for any abortions for which the State Welfare agency provides payment."
>
> Letter from Albert J. Richter, Associate Commissioner, Medical Services Administration, Social and Rehabilitation Service, Department of Health, Education and Welfare, April 1, 1974.

The letter also indicates that HEW will reimburse abortion as a family planning service. It goes on to state

that before ROE V. WADE, states could exclude abortion from medicaid coverage.

The HEW position is, then, that there is some leeway given to the states in the range of abortion services they provide. However, this leeway cannot be used to restrict abortion in ways not permitted by ROE V. WADE and DOE V. BOLTON. Those cases define the limits of state restriction on abortion; they do not affirmatively require any restriction at all. Thus some states might opt to permit abortion at any time during pregnancy, or permit non-hospital abortion for some time period beyond the first trimester. Such abortions would be reimbursable by HEW, while other states could restrict medicaid payments to the full extent permitted by the Supreme Court. HEW does not undertake to define specifically the conditions under which any medical service is necessary. This does not mean, however, that a state is free to exclude, for example, an appendectomy from medicaid coverage. It treats abortion, therefore, the same way it treats all other comparable types of care, and this is all plaintiffs seek in this action.

Defendants seek to impugn the quality of the evidence of HEW's position based on the fact that the agency is " equivocal, if not evasive." The letter quoted above seems

as direct as is necessary under the circumstances. The defendants cite the failure of HEW to intervene in DOE V. WOHLGEMUTH, 376 F. Supp. 173 (W.D. Pa. 1974) as evidence of its equivocation. Yet the Court in that case was able to find that "the Federal Government would share in the costs of abortion under the terms and provisions of the State Medicaid Program." Id. at 178. HEW's position was so clear that the agency no doubt did not feel it necessary to set it forth in a brief amicus curiae.

II. DENIAL OF PAYMENT FOR ABORTIONS NOT MEDICALLY NECESSARY FOR THE PATIENT'S HEALTH VIOLATES THE REQUIREMENTS OF THE MEDICAL ASSISTANCE AND AID TO FAMILIES WITH DEPENDENT CHILDREN TITLES OF THE SOCIAL SECURITY ACT.

A. RECIPIENTS OF MEDICAL ASSISTANCE HAVE A STATUTORY RIGHT TO RECEIVE ABORTION SERVICES TO THE EXTENT THAT SUCH SERVICES ARE AVAILABLE TO THE GENERAL POPULATION.

Title XIX not only permits payment for abortion, it requires such payment, and the District Court so concluded.

Title XIX of the Social Security Act provides for a comprehensive program of medical care for the needy, administered by the states and funded jointly by the states and the federal government.

The Connecticut statutes implementing Title XIX are found in Connecticut General Statutes §17-134a-17-134 l . These statutes and the regulations thereunder must conform to the

requirements of Title XIX, and the federal courts have jurisdiction to compel compliance with that act. WILCZYNSKI V. HARDER, 323 F. Supp. 509 (1971); KING V. SMITH, 392 U.S. 309 (1968); TOWNSEND V. SWANK, 404 U.S. 282 (1971). Thus a state cannot impose financial eligibility requirements which conflict with Title XIX and the regulations established thereunder. WILCZYNSKI V. HARDER, Supra. SCHAAK V. SCHMIDT, 344 F. Supp. 99 (E.D. Wis. 1971), nor can it exclude classes of persons for whom coverage is intended. TRIPLETT V. COBB, 331 F. Supp. 562 (D. Miss. 1971).

The scope of services which must be offered under a state medicaid program are specified in the statute and are also subject to judicial enforcement. See BASS V. ROCKEFELLER, 331 F. Supp. 945 (S.D. N.Y. 1971). The statutory right to these services is a matter of entitlement for those qualified to receive them and their termination involves important "personal rights." JOHNSON V. HARDER, 438 F.2d 7 (2d Cir. 1971); GOLDBERG V. KELLY, 399 U.S. 258, 262 (1970).

A state has no discretion to deny coverage for care and services required by the statute.

> . . . The Social Security Act and regulations promulgated thereunder are to be construed in favor of inclusion rather than exclusion, and narrow and legalistic interpretations of the statutory language are disfavored if they conflict with the beneficent purposes of the Act. SMITH V. VOWELL, 43 L.W. 2033 (W.D. Tex. July 23, 1974).

Connecticut extends the benefits of medical assistance to all individuals receiving payments under any of the federal categories of public assistance, including Aid to Families with Dependent Children, the program under which plaintiffs receive aid. This coverage is mandatory under Title XIX, 42 U.S.C. §1396a (10). In addition, Connecticut takes advantage of optional coverage of persons whose income is too high to qualify for cash categorical assistance but too low to meet their medical needs. 42 U.S.C. §1396a (a) (10) (B). These are the so-called "medically needy."

Under Title XIX the states must provide certain minimal medical services, these are: (1) inpatient hospital services; (2) outpatient hospital services; (3) laboratory and x-ray services; (4) skilled nursing facilities, screening and diagnosis of children; and (5) physicians' services furnished by a physician in his office or elsewhere, 42 U.S.C. §1396a(a)(13)(B).

Plaintiffs submit that the abortion services which defendants have excluded from coverage under the Medical Assistance Program fall squarely within "physicians' services" which are required under Federal law. "Physicians' services" are defined in the Social Security Act as those services from "a doctor of medicine or osteopathy legally authorized to practice medicine and surgery by the State in which he

performs such function or action". 42 U.S.C. §1395x(R)(1). The U.S.-Department of Health, Education and Welfare further defines "physicians' services" as "those services provided, within the scope of practice of his profession as defined by State law, by or under the personal supervision of an individual licensed under State law to practice medicine or osteopathy." 45 C.F.R. §249.10(b)(5). Connecticut defines reimbursable physicians' services as "professional services provided in the office, home or institution by a physician or doctor of osteopathy licensed to practice his profession of medicine and/or surgery as defined by state law." Manual Ch. III §281.

Abortion is now a service well within the scope of practice of practicing obstetricians and gynecologists in Connecticut. Department of Health Regulations require that abortion be performed by "a person licensed to practice medicine and surgery in the State of Connecticut." Reg. §19-13-D54 (a). During the first trimester of pregnancy abortions may also be performed in physicians' offices, or other locations outside of hospitals. 19-13-D54.

Similarly abortion falls within the category of inpatient hospital services. 42 U.S.C. §1396a(a)(13)(B) and (c), 1936d(a) (1). Inpatient hospital services (other than services in an institution for tuberculosis or mental diseases)

are defined as follows by H.E.W. regulations.

> 'Inpatient hospital services' are those items and services ordinarily furnished by the hospital for the care and treatment of inpatients provided under the direction of a physician or dentist in an institution maintained primarily for treatment and care of patients with disorders other than tuberculosis or mental diseases and which is licensed or formally approved by an officially designated State standard setting authority and is qualified to participate under Title XVIII (Medicare) of the Social Security Act...

Connecticut provides medical assistance for "care received in general hospitals" without prior authorization, up to ten days. Manual Ch. IV §301.

H.E.W. regulations, 45 C.F.R. 249.10 (b) (2) define outpatient hospital services as "those preventive, diagnostic, therapeutic, rehabilitative, or palliative items or services furnished by or under the direction of a physician or dentist to an outpatient by an institution which is licensed...".

Abortion services can readily be classified into either the preventive or rehabilitative items in this definition. When confronted with an unwanted pregnancy, a woman whether she elects to terminate the pregnancy or follow through to birth is going to require medical services. Medical services in the form of termination are preventive in that they preclude the necessity for later and more risky

medical services. Abortion services are also rehabilitative in that they restore the pregnant woman to a state wherein she is no longer in need of further medical services. Under such a broad regulatory definition for outpatient services, a State should not be free to pick and choose which medical service can be excluded.

In addition to the HEW definitional regulation for inpatient hospital services cited above, all medical services included in a State Medicaid plan are subject to a more general sufficiency standard embodied in an HEW regulation. 45 C.F.R. §249.10 (a) (5) requires participating states to:

> "[s]pecify the amount and/or duration of each item of medical care or remedial care and services that will be provided to the categorically needy and the medically needy, if the plan includes this latter group. Such items must be sufficient in amount, duration and scope to reasonably achieve their purpose." (Emphasis added)

On its face this regulation is very clear: token services are forbidden. Failure to reimburse for inpatient abortions unlawfully limits the amount and narrows the scope of the federally mandated inpatient hospital service. In Supplement D. of the Handbook of Public Assistance Administration, HEW has expanded on the concept of sufficiency, at §51400:

> "The medical assistance made available must be sufficient in amount, duration and scope to reasonably achieve its purposes. A token service which can only be ineffective on the one hand, and wasteful of funds on the other will not be considered satisfactory...
>
> ***
>
> Limitations may not be set by eliminating certain groups of patients or certain diagnoses from coverage..."

The District Court of Utah ruled that under all of these provisions a state which participates in medicaid may not limit the scope of covered services by refusing payment for elective abortion.

> "Defendants, his agents and employees are without authority, under the provisions of subchapter XIX of the Social Security Act of 1935, as amended, Section 1396, et. seq. of Title 42 U.S.C. and in particular, Sections 1396a(a)(10) and (13) and Sections 1936d(a)(1) and (5) of Title 42 U.S.C., to deny to plaintiffs abortions based upon whether or not they are "therapeutic." Slip Opinion p.4. DOE V. ROSE, ____, F. Supp. _____ (D. Utah 1973) aff'd on other grounds, 43 U.S.L.W. 2032 (10th Cir. June 27, 1974).

Connecticut's regulations implementing the Medicaid program conform to the mandate of the federal statutes and regulations and require a broad and comprehensive set of medical services. The State Welfare Manual, Vol. 3 Ch. J §030 states:

> "For all programs, with the exception of the Medical Assistance for the Aged Program, the Department provides for complete care including the professional services of any licensed practitioner of the healing arts and allied professions. . . Services and supplies are made available for the prevention of illness and disease as well as for the diagnosis and treatment of illness, injury or infirmity; the promotion and maintenance of good physical and mental health; and the rehabilitation of the patient after injury or illness. See also Vol. 1 Supp. D-2, D-220.

Under scope of services the department states that medical care and services "will be equal in amount, duration and scope for all individuals" with certain federal statutory exceptions. Vol. 3 Supplement D-2, SD-221.

Section 1396 of the Social Security Act provides for a further type of service:

> "rehabilitation or other services to help such families and individuals attain or retain capabilities for independence or self-care."

Abortion is very often essential to enable an AFDC recipient to ultimately gain her independence from the welfare system. Plaintiff Linda Poe, a seventeen year old, will shortly graduate from high school and be self-supporting. Had she not had an abortion she and her child would have been added to the AFDC caseload for an indefinite period of time.

To single out abortion in the face of these requirements as to scope of services is an impermissible narrowing of the scope of coverage required by 42 U.S.C. §1396a. Abortion is preventive, as noted above; it also promotes and maintains good physical and mental health; and it is rehabilitative.

It is true that one three-judge court has ruled that the Social Security Act does not require payments for elective abortions. DOE V. WOHLGEMUTH, 376 F. Supp. 173 (W.D. Pa. 1974). That court did hold that the State of Pennsylvania violated the equal protection clause of the Fourteenth Amendment, as well as the right to privacy of the recipient-patients, by refusing to make such payments. In ruling on the statutory question, that court's opinion is, plaintiffs submit, badly reasoned. On the premise that the categorical assistance programs embody a "scheme of cooperative federalism", the court seems to reason that Congress left to the states the decision as to what medical services are to be provided. The state plan requirements under Title XIX are, however, mandatory on the states. SMITH V. VOWELL, Supra. See also, BASS V. ROCKEFELLER, Supra.

State plan requirements are enforceable under the Supremacy Clause of the United States Constitution. KING V. SMITH, 392 U.S. 309 (1968); TOWNSEND V. SWANK, 404 U.S. 282 (1971). Those cases cited by the Pennsylvania court concern a few very narrow areas where the federal statute exhibits an intent to leave certain decisions to the states. NYS DEPT. OF SOCIAL SERVICES V. DUBLINO, 37 L.Ed. 2d 688 (1973) (experimental work requirements for AFDC recipients); JEFFERSON V. HACKNEY, 406 U.S. 535 (1972); DANDRIDGE V. WILLIAMS, 397 U.S. 471 (1970) (both concerning the states' undisputed authority to determine the actual level of AFDC payments). None of the cases concern the scope of care provided under Title XIX.

The state plan requirements under medicaid are delineated in 42 U.S.C. §1396a. The statute indicates which services are mandatory and which are optional. §1396a(a)(13) and §1396d(a). The concept of cooperative federalism cannot convert the former to the latter.

The courts have even extended the mandatory area to services not specified in §1396d but which are required for adequate utilization of mandatory services. In SMITH V. VOWELL, Supra. the court ruled that an HEW regulation requiring transportation to obtain medical service was binding on the states.

It is absurd to suggest that Congress meant to exclude payments for abortion services because it did not specifically authorize them in the statute. Surely Congress could not have listed every conceivable form of medical care covered under medicaid. Instead it chose to include a mandatory set of minimum services which must be provided by each state.

It is impossible to reconcile this portion of the opinion in DOE V. WOHLGEMUTH with the court's holding that the state could not constitutionally deny payments for abortion services once it provides general medical care to the indigent.

This holding would presumably invalidate any federal statute which permitted exclusion of payment to recipients who exercised a constitutional right.

B. THE FAMILY PLANNING PROVISIONS OF TITLE IV-A (AFDC) AND TITLE XIX (MEDICAID) OF THE SOCIAL SECURITY ACT ALSO REQUIRE DEFENDANTS TO PAY FOR ABORTION SERVICES FOR ELIGIBLE WOMEN.

1. THE SOCIAL SECURITY ACT REQUIRES THAT PARTICIPATING STATES PROVIDE FAMILY PLANNING INFORMATION TO ALL WOMEN ELIGIBLE FOR AFDC AND PROVIDE FAMILY PLANNING SERVICES TO ALL AFDC AND MEDICAID RECIPIENTS WHO REQUEST SUCH SERVICES.

The plaintiffs argued below that the family planning

requirements of Title IV of the Social Security Act also compel reimbursement for abortion services. The District Court, basing its decision on Title XIX, saw no need to reach this issue,[5] but it is still before the Court, and available as an alternative ground for affirmance.

Since January 1, 1973, Title IV-A of the Social Security Act has required participating states to provide programs:

> "...for preventing or reducing the incidence of births out of wedlock and otherwise strengthening family life, and for implementing such a program by assuring that in all appropriate cases (including minors who can be considered sexually active) family planning services are offered (to appropriate individuals) and are provided promptly (directly or under arrangements with others) to all individuals voluntarily requesting such services..." 42 U.S.C 8602 (a) (15)

Since January 1, 1973, Title XIX of the Social Security Act has similarly required that as part of their Medical Assistance programs states must provide:

5/ It is simply not true that "the court found no merit in the contention." (See Brief for Appellants, p. 4)

> "(C) family planning services and supplies (directly or under arrangements with others) to individuals of childbearing age (including minors who can be considered sexually active) who are eligible under the state plan and who desire such services and supplies." 4] U.S.C. §1396d (a) (4) (C).

Although family planning services were required for only AFDC recipients eligible for the Work Incentive Program when first enacted in 1967 (P.L. 90-248 §201, Stat. 877, Jan. 2, 1968), Congress considered their provision so important that the 1972 Amendments to the Social Security Act expanded the categories of recipients for whom the participating states were required to provide services to all appropriate AFDC and Medicaid eligibles and increased the Federal matching funds for state expenditures for family planning services and supplies to 90 percent. 42 U.S.C. §§603 (3) and 1396 (a) (5). These amendments were intended "(t)o remove any existing financial barrier to the availability of family planning counseling and services to those desiring such services." Sen. Rept. No. 92-1230, 92nd Cong., 2nd Sess. (1972) 297 (hereinafter "Sen. Rept.").

Connecticut has apparently implemented these family planning requirements through a system of counselling and

referrals to physicians and other community resources. Letter to Steven Simonds, Commissioner, Community Services Administration, H.E.W. from Henry C. White, Commissioner of Welfare, May 20, 1971, and State of Connecticut, Report on Services to AFDC Families, 1971-72, supplied in answer to plaintiffs interrogatories Nos. 22A-22D.

The purposes of the family planning services program are to reduce illegitimacy, enhance opportunities for personal self-sufficiency, and assist women to control family size in order to enable them to better meet family needs. Emphasis is placed upon inducing self-support, strengthening family life and retaining capability for personal independence. In explaining what type of family planning services would be mandated by the 1972 amendments, the Senate Finance Committee stated that:

> "In addition to the provision of counseling, services, and supplies designed to aid those who voluntarily choose not to risk initial pregnancy, emphasis would be placed upon assisting those families with children who desire to control family size in order to enhance their capacity and ability to seek employment and better meet family needs." Sen. Rept. at 297.

The categories of recipients eligible under the AFDC and Medical Assistance programs overlap to some extent. All AFDC eligibles are also eligible recipients under the Medical Assistance program. 42 U.S.C. §1396a (a) (10). However, this overlap was purposeful as Congress wanted to extend the right to such services not only to present AFDC recipients, but, as the Senate Finance Committee reported, to "...former welfare recipients of child-bearing age and also...those persons likely to become recipients in the absence of such services." Sen. Rept. at 295-6. These individuals are only eligible under Medicaid. 42 U.S.C. §1396a (a) (10) (B). In addition the double provision of the entitlement to family planning services emphasizes the importance of the program to Congress.

2. ABORTION IS A FAMILY PLANNING SERVICE.

Abortion is generally recognized by medical experts and public health officials to be an important family planning method. "There is relatively uniform consensus among health care professionals that family planning services include such specific techniques as co[illegible]ception, abortion,

sterilization and treatment for infertility." Wallace, Goldstein, Gold, and Oglesby, "A Study of Title 19 Coverage of Abortion" Am. Journal of Public Health, Aug. 1972, at 1120. "Abortion serves as a back-up method of handling contraceptive failure and as a means of meeting family planning needs where contraception has not been used or provided. It is therefore a necessary element in a comprehensive system of family planning services." Report of the President's Commission on Population Growth and the American Future, G. P. O., 1972 at 103.

The legislative history supports the view that abortion was to be included as one method of family planning available under these programs. In legislative hearings to amend the Public Health Service Act, 42 U.S.C. §101 et. seq. to provide grants for special direct service projects for the provision of family planning services, an interchange between James Hastings, Representative from New York, and Secretary of HEW Richardson confronted the issue of the effect of legalization of abortions in a general discussion of family planning:

> Mr. Hastings: Along those lines, and a controversial question, and particularly in light of the action of several states recently, and talking about unwanted children, do you anticipate a policy

emanating from your department as it relates to legalized abortion?
Secretary Richardson: I don't anticipate that we would take a position on this as a Federal agency beyond saying in effect, that one, this is a matter for State action, and two, that in general we believe that medical services in cases where a pregnancy is unwanted or medically undesirable should be available without undue legislative restrictions.
Mr. Hastings: Would Medicaid payments cover abortion costs in a case where abortion is legal?
Mr. Richardson: Yes it would, where it is otherwise as you say a legal service."
Hearings on H.R. 4208 before the Subcomm. on Pub. Health and Envir., Int. and For. Commerce Comm., House of Representatives, 91st Cong. 2nd Sess., Part I, at 99.

When Congress has sought to limit family planning funds to contraceptive as differentiated from abortifacient techniques, they have done so explicitly. For example, Title VIII of the Public Health Services Act provides, "None of the Funds appropriated under this sub-chapter shall be used in programs where abortion is a method of family planning." 42 U.S.C. §300a-6. The emphasis in Title VIII is on research into methods of family planning, training of personnel to deliver services and development of informational and educational materials. In determining priorities for refining and

developing family planning methods, Congress by excluding abortion, chose to concentrate efforts on contraceptive and pre-contraceptive techniques. Exclusion of funds for abortion under Title VIII of the Public Health Service Act does not affect the use of funds under Titles IV-A and XIX of the Social Security Act. On the contrary, the specific exclusion demonstrates that had Congress wanted to exclude abortion as a family planning service from the entitlements created by AFDC and Medicaid it would have been as explicit as it was in the Public Health Service Act.

Proposed HEW regulations defining the scope of the Medicaid family planning provision do not exclude medically approved abortions:

> (iii)...Family planning services and supplies are any medically approved means, including diagnosis, treatment, drugs, supplies,devices and related counseling which are furnished or prescribed under the supervision of a physician, for individuals of childbearing age...for purposes of enabling such individuals freely to determine the number and spacing of their children." 45 C.F.R. §249.10 (b) (4) (iii), 38 F.R. 15582 (June 13, 1973).

As in the ROE decision, emphasis is placed on the judgment of the physician, who is given full opportunity to furnish such services as necessary to achieve the statutory

purpose. Since abortion is one of the medically approved means or treatment which accomplishes these purposes, Medicaid eligible women are entitled to reimbursement for this service either on an inpatient or outpatient basis.

HEW regulations for AFDC also define the family service program so as to allow the inclusion of abortion.

> "Family services are social, educational and medical services to enable appropriate individuals (including minors considered to be sexually active) to limit voluntarily the family size or space the children, and to prevent or reduce the incidence of births out of wedlock. Such services include printed materials, group discussions, and individual interviews which provide information about and discussion of family planning; medical contraceptive services and supplies; and help in utilizing medical and educational resources available in the community. 45 C.F.R. §221.9 (b) (6) (i).

As previously indicated, abortion is a recognized medical service presently available in the community which accomplishes the stated purpose. The specific reference to medical contraceptive services in the family services definition is an example of one type of service which must be offered. It does not exclude abortion any more than it excludes other "medical services."

The requirement that states must "help (individuals)

utilize" medical resources indicates that, among other things, states must inform appropriate, eligible women that various abortion resources are available, and must reimburse for the costs if such resources are utilized. No qualification exists on the family planning service statutory or regulatory language mandated by Congress for inclusion in state AFDC or Medical Assistance programs.

III. THE DENIAL OF MEDICAID REIMBURSEMENT FOR ABORTION SERVICES VIOLATES PLAINTIFFS' CONSTITUTIONAL RIGHT TO PERSONAL PRIVACY AND LIBERTY.

A. A STATE MAY NOT DISCRIMINATE AGAINST WOMEN WHO SEEK AN ABORTION BY DENYING THEM MEDICAL ASSISTANCE.

Any statute, be it state or federal, which provides funds for general medical care would be unconstitutional if it did not also provide funds for abortion services. That is why any argument as to the validity of legislation dealing with abortion must consider the constitutional dimensions of the issue.

In ROE V. WADE, 410 U.S. 113, (1973), the U.S. Supreme Court ruled that a woman's right of personal privacy includes the right to decide to undergo an abortion.

"This right of privacy whether it be founded

> in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision to terminate her pregnancy." 410 U.S. at 143.

This decision, along with DOE V. BOLTON, 410 U.S. 179 (1973), set forth the permissible parameters of all state action which impinges on the abortion decision.

The Court held that the State must prove a compelling interest to justify any interference with a woman's right to abortion. During the first trimester of pregnancy the abortion decision must be left to the woman's physician, since no state interest justifies interference with what is essentially a medical decision, at this stage of pregnancy. Until the end of this trimester:

> "...the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that in his medical judgment the patient's pregnancy should be terminated. If that decision is reached, the judgment may be effectuated by an abortion free of interference by the state."

During the second trimester, the State may regulate abortion procedures in any way reasonably related to the health of the mother. At this point the state may, for

example, regulate who may perform abortions and where. After the second trimester, when the fetus reaches viability, the State's interest in the life of the unborn child is compelling and abortion can be limited or prohibited, though not when necessary to preserve the life of the mother. 410 U.S. at 147.

In DOE V. BOLTON, supra, the Court applied the broad principles of ROE to specific restrictions on the availability of abortion imposed by a Georgia statute. The Court ruled that the state could not require the concurrence of two physicians once a woman's attending physician agreed to perform an abortion, and could not require that abortion during the first trimester be performed at an accredited hospital or approved in advance by a committee of the medical staff of the hospital. Id. at 195-6.

Applying the compelling interest standards of ROE V. WADE and DOE V. BOLTON, social welfare legislation which penalizes or unduly restricts those who exercise their right to abortion cannot be upheld. DOE V. WOHLEGEMUTH, 376 F. Supp. 173, 189-90, 191 (W.D., Pa. 1974) Discouragement of abortion is not a legitimate state interest. DOE V. ROSE, 43 U.S.L.W. 2032 (10th Cir., June 27, 1974),

slip op. at 11; DOE V. WESTBY, CIV 74-5017, (D.S.D.), Sept. 24, 1974, slip op. at 4./[6.]

> "...A State need not, in the first instance, participate at all in the various federal welfare programs,...and...should a state decide to participate, then the degree of its participation is also a matter to be determined by the state. However, once a state elects to participate in a federal welfare program, it must follow federal statutes and regulations and must also administer the program in a constitutional manner.....In fact, even a state welfare program funded entirely by the state must be administered in a manner consistent with the United States Constitution. NEW JERSEY WELFARE RIGHTS ORG. V. CAHILL, 411 U.S. 619 (1973), DOE V. ROSE, supra at 6/[7.]

6./ In the case at bar, defendants offered no state interest to justify their policy other than the alleged necessity requirements of Title XIX. This brief has amply shown that interest to lack even a rational basis.

7./ See SHAPIRO V. THOMPSON, 394 U.S. 618 (1969), in which the right to travel was at stake, a right also founded in the concept of personal liberty rather than an explicit Constitutional provision. The Supreme Court ruled that welfare payments cannot be denied to new residents, because to do so would interfere with that right. SHAPIRO was extended to apply to medical care in MEMORIAL HOSPITAL V. MARICOPA COUNTY, ____ U.S. ____ 39 L.Ed.2d. 306 (Feb. 26, 1974), where the Court struck down an Arizona statute requiring one year's residence in a county before one could receive non-emergency medical care at county expense.

The denial of publicly financed medical care to an indigent person was held to be the denial of "a basic necessity of life." Id. at 315.. It could not be withheld from those who chose to exercise their right to travel. The fact that care was provided for emergency needs, and that in practice private hospitals treated indigents denied care by the county, did not mitigate the state's refusal to pay for all medical care.

In DOE V. ROSE, supra, the Tenth Circuit upheld an injunction against a Utah policy providing medicaid payment for therapeutic abortion only. The abortion had to be approved as therapeutic (necessary to save the mother's life or to prevent serious and permanent injury to her health) by the Director of the State Department of Social Services. The court held that the policy was invalid under ROE V. WADE, supra, and DOE V. BOLTON, supra. It affirmed the District Court's injunction and at the same time approved the holding of another Utah three-judge court which had enjoined enforcement of a statute barring medicaid payment for non-therapeutic abortion. DOE V. RAMPTON, 366 F. Supp. 189 (D. Utah 1973)

> "And in that case the court went on to declare in so many words that 'the State may not use its medicaid program to limit abortions.' We generally agree with these pronouncements." DOE V. ROSE, supra. at 7.

In the District of South Dakota a three judge court just last month held that state's limitation on medicaid for non-therapeutic abortions unconstitutional under equal protection standards.

> This policy reflects the moral judgment of the State that the pregnancies must

> terminate only by birth of a child or for therapeutic reasons. This moral judgment is not a compelling state interest which would justify inhibiting a woman in her exercise of a fundamental personal right as defined in ROE and DOE. DOE V. WESTBY, Supra at 4.

In DOE V. WOHLGEMUTH, Supra., the Court enjoined Pennsylvania's policy which provided payment for abortion if a continued pregnancy threatened the life or health of the mother; the child was threatened by a physical or mental deformity; pregnancy resulted from rape or incest and therefore threatened the health of the patient; two other physicians concurred in the abortion decision; and the abortion was performed in an accredited hospital. The Court held that this regulation denied equal protection to those indigent women who elected to have an abortion, and unlawfully inhibited the fundamental rights of pregnant women. The following paragraph is particularly instructive in view of the defendants claim that plaintiffs' abortions were not medically necessary:

> We hold that the Commonwealth has already determined that the condition of pregnancy brings about the necessity of medical services. The Commonwealth cannot then discriminate with respect to the methods of treatment for that condition, for in the first trimester of pregnancy, ROE V. WADE

Supra. the selection of the method of treatment is the inviolable fundamental right of the physician and the patient. 376 F. Supp. at 192.

A related line of cases have prohibited public hospitals from refusing to permit, or limiting the grounds for abortion to be performed in the facilities. NYBERG V. CITY OF VIRGINIA, 495 F.2d 1342 (8th Cir. 1974); DOE V. HALE HOSPITAL, 43 U.S.L.W. 2039 (1st Cir. July 12, 1974).

Even a university hospital which need not provide comprehensive medical care, but may limit services to those furthering its educational program, is prohibited from refusing to perform abortions. There was no compelling interest in excluding this one form of care, when no other service was treated similarly. ORR V. KOEFOOT, 43 U.S.L.W. 2003 (D. Neb. June 12, 1974). A public hospital may not refuse to perform voluntary sterilization. HATHAWAY V. WORCESTER CITY HOSPITAL, 475 F.2d 701 (1st Cir. 1973). And the right to abortion may not be restricted by an ordinance governing abortion clinics which is not applicable to clinics offering other forms of medical care, WORD V. POELKER, 495 F.2d 1349 (8th Cir. 1974). 6/

6/ "Since a woman's right to make an abortion decision is protected by the Fourteenth Amendment, any state statute that makes the performance of an abortion a crime or that requires the medical profession to observe unnecessary abortion restriction rules is invalid." DOE V. BELLIN MEMORIAL HOSPITAL, 479 F.2d 756 (7th Cir. 1973).

The Supreme Court indicated that the decision in ROE V. WADE governs the availability of public assistance for abortions, when it remanded the case of KLEIN V. NASSAU COUNTY MEDICAL CENTER, 347 F. Supp. 496 (E.D. N.Y. 1972) rem. 412 U.S. 924, (1973) for further consideration in the light of ROE V. WADE and DOE V. BOLTON. In KLEIN a three-judge court ruled, in a case nearly identical to this one, that the State could not deny medical assistance for 'elective abortion not medically indicated' when such abortions were legal and available to the general population when requested by a woman and approved by her physician. The District Court in KLEIN held that the denial of elective abortion to the medically indigent violated the federal Social Security Act and the Equal Protection Clause. The Supreme Court could have affirmed on either ground but instead ordered the lower court to base its decision on the newly enunciated right of a woman to make an abortion decision.

B. DEFENDANTS' REGULATIONS GOVERNING MEDICAID PAYMENTS FOR ABORTION DENY PLAINTIFFS THEIR RIGHT TO MAKE THE ABORTION CHOICE AND DO NOT SERVE ANY COMPELLING STATE INTEREST.

1. DEFENDANTS CANNOT REQUIRE THAT THE ABORTION BE NECESSARY TO THE PATIENT'S HEALTH.

The District Court held that the various administrative requirements imposed by Connecticut on medical assistance for

abortion denied the plaintiffs their constitutional rights. It therefore enjoined all of the Public Assistance Manual Vol. 3 Ch. III §275. No part of this regulation is limited to the first or second trimester of pregnancy; in toto it imposes restrictions which are unrelated to any valid state interest; and so cannot be upheld. DOE V. RAMPTON, Supra. 366 F. Supp. at 193-4.

Section 235 requires that a recipient's physician and the chief of service certify that the abortion is necessary to the patient's health. The prior authorization form must also indicate the necessity of the abortion. The net result of this 'necessary to health' requirement is to bar abortion for indigent women who choose to terminate a pregnancy because they do not wish to bear a child. The preceding portions of this brief amply demonstrate that abortion may not be classified by the State in this manner.

The requirement means that the state is making a judgment as to the conditions under which a woman may choose abortion, and is imposing a penalty (loss of medical assistance) on women who make the disfavored choice. This is an intrusion into a woman's private and personal rights which is directly contrary to the spirit and letter of ROE V. WADE, and DOE V. BOLTON, Supra.

2. DEFENDANTS CANNOT REQUIRE THAT BOTH THE ATTENDING PHYSICIAN AND THE CHIEF OF OBSTETRICS AND GYNECOLOGY CERTIFY THAT AN ABORTION IS MEDICALLY NECESSARY TO THE PATIENT'S HEALTH.

Plaintiffs further object to the requirement that the necessity for the abortion be attested to by both the attending physician and the head of obstetrics and gynecology at the hospital where the abortion is to be performed. This is precisely the sort of requirement that was struck down by the Supreme Court in DOE V. BOLTON, Supra.

There the Court could "see no constitutionally justifiable pertinence to the structure for the advance approval by the abortion committee..."

> "Required acquiescence by co-practitioners has no rational connection with a patient's needs and unduly infringes on the physician's right to practice." 410 U.S. at 196.

It is basic to the right enunciated in ROE and DOE that the woman and her physician possess the exclusive right to decide on an abortion, at least during the first trimester. That decision cannot be subject to the supervision or review of another person or agency. To single out abortion and subject it to a concurrence requirement which is not imposed on any other medical procedure is an unlawful interference with the rights of both physician and patient. WORD V. POELKER, Supra. at 1351-2.

3. DEFENDANTS CANNOT REQUIRE PRIOR AUTHORIZATION FOR THE PERFORMANCE OF AN ABORTION.

As noted in the State[illegible] of Facts, Supra. defendants have placed abortion in a special category of medical services which require prior approval or authorization by the Welfare Department. The prior approval requirement in effect allows the defendants to look behind the medical judgment of the attending physician and review the circumstances of the case to make an independent determination of the advisability of the abortion.

There was evidence before the District Court that plaintiffs' physician would perform an abortion only during the first twelve weeks of pregnancy, except in very unusual circumstances, and that abortion is an emergency procedure when a woman is close to or beyond the twelfth week of pregnancy. At Park City Hospital abortions are normally scheduled within a few days of a physician's request. The evidence also showed that a request for prior authorization was not returned to the hospital for two weeks in most cases. Even at best the request takes three days to reach the Welfare Department, three days to be processed, and three days to be returned to the hospital or physician. Thus there is a lapse of at least nine days for a procedure which best medical practice requires to be performed within three to seven days. For a woman

close to her twelfth week of gestation, such a delay seriously increases the medical risks of abortion and may outrule the procedure entirely.

The defendants were apparently advised by the Attorney General's Office that prior authorization is unlawful. See memorandum from H. Boyle to S. Smith, provided in answer to plaintiffs' interrogatories,

> We take exception to Mr. MacGregor's last paragraph which, although rather ambiguous, indicates that we cannot require prior authorization in the performance of the abortion procedures. We feel that an abortion is not a normal medical procedure and until so instructed by the Court we will require prior authorization. Our action is based on the fact that presently we require prior authorization on many items and procedures that are considered "exceptional" rather than normal procedure.

This assertion that the State can impose an additional requirement on abortion reimbursement because it is not "normal" is the mirror image of what the Constitution demands. If abortion is at all unusual it is in its status as a component of the right to privacy and liberty protected by the Bill of Rights. It must therefore be subject to minimum, not maximum restriction, and any official interference must be justified by a compelling state interest. ROE V. WADE, Supra. DOE V. BOLTON, Supra. NYBERG V. CITY OF VIRGINIA, Supra.

Finally plaintiffs object to the requirement, implicit in defendants' regulations, that abortion must be performed in an accredited hospital, and to the certification of consent required in §275(1). As to the former, limitation of abortion to accredited hospitals during the first trimester is prohibited by DOE V. BOLTON, Supra. As to consent, defendants are adequately protected by the general rule that no physician can perform non-emergency surgery without informed consent, and hospitals have elaborate consent procedures for all their patients.

On its face defendants' regulations are not related to the interests upheld as legitimate in ROE V. WADE and DOE V. BOLTON. None of the procedures involves any differentiation between the first and subsequent trimesters of pregnancy. NYBERG V. CITY OF VIRGINIA, Supra. None bears any relation to maternal health. Moreover any concern for maternal health is adequately protected by Health Department regulations which are applicable to the general population. See Regulations of Connecticut State Agencies, §19-13-D54. WORD V. POELKER, Supra.

Prior authorization is required for only 21 forms of medical care. It requires a seventy-eight page booklet to list all forms of medical care available in the medicaid program. State of Connecticut Welfare Relative Value Scale of Physicians Services and Procedures and Diagnoses Codes. 1972

For the vast majority of services, defendants require a simple billing procedure, whereby the provider indicates the condition of the patient and the treatment rendered. This form is submitted after treatment is begun. The chief control system relied on by defendants is the Relative Value Scale, and various fee schedules, which limit the amount defendants will pay for a particular service. The provider cannot charge the patient more than this minimum once he or she agrees to accept medicaid payment.

A woman undergoing childbirth received medical reimbursement for all necessary care without prior approval. The only showing of necessity permissible in the abortion context during the first two trimesters is that the woman was pregnant, she requested or consented to the abortion, and her physician concurred in that decision. Regular billing procedures are adequate to insure such a showing, just as they are adequate for every other surgical procedure.

Any financial interests defendants might have in limiting the number of abortions is first of all irrelevant, SHAPIRO V. THOMPSON, Supra., MEMORIAL HOSPITAL V. MARICOPA COUNTY, Supra. and is ephemeral at best, since abortion is by far the least expensive alternative available to the State. If the plaintiffs and members of their class are forced to carry their pregnancies to term, the state is obligated to pay

the costs of delivery and pre and post natal care and to provide public assistance for the support of the child for an indeterminate number of years.

Defendants' policies constitute an "extra layer of restriction placed upon abortion" WORD V. POELKER, Supra. at 1351, which must fall because they serve no compelling state interest, and "unduly penalize those patients who seek and those doctors who choose to perform abortions." Id. at 1352.

IV. DEFENDANTS' ABORTION RESTRICTION REGULATIONS DENY PLAINTIFFS THE EQUAL PROTECTION OF THE LAW.

Under the defendants' restrictions on medicaid payments for abortion, plaintiffs are subject to discriminatory state action which denies them the right to equal protection of the law. Plaintiffs are members of a disfavored class in respect to three separate considerations. (a) They are denied the right to choose an abortion solely because of their indigency. Women who can afford the necessary medical care can obtain abortions subject only to restrictions permitted under ROE V. WADE, Supra. and DOE V. BOLTON, Supra., and codified in Department of Health regulations which regulate performance of abortions in accordance therewith. (b) Plaintiffs are denied reimbursement for a legitimate medical expense necessitated by their pregnancy because they have made a morally disfavored

choice, abortion, while women who choose to carry pregnancy to term are granted medical assistance for all pregnancy related care. Defendants' answers to interrogatories admit that no other form of obstetrical care requires prior authorization. (c) Plaintiffs are required to undergo the burdensome and time-consuming procedure of obtaining prior approval of a service authorized by their physicians. Such approval is not required for any other hospital procedure, nor for any comparable physician's care. Moreover, no other medical procedure requires the approval of two physicians, only one of whom is the patient's attending physician.

An indigent woman faced with an unwanted pregnancy is forced by the State to choose only one method of dealing with her condition: having the baby. A fundamental right is limited to those who opt for a morally disfavored choice. KLEIN V. NASSAU COUNTY MEDICAL CENTER, Supra. 347 F. Supp. at 500-501.

> [To] provide medicaid benefits to those eligible women who choose to carry their pregnancies to term and those who receive therapeutic abortions and deny medicaid benefits to those eligible pregnant women who elect a non-therapeutic abortion...has created a classification which is in violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. DOE V. WESTBY, Supra. at 5.

The administrative requirements for abortion reimbursement further single out all indigents who chose abortion rather than other forms of care and create obstacles which at best

place unnecessary burdens on that choice and at worst deny persons making said choice the medical care they require.

Defendants would have the court utilize the more lenient rational basis test applied to social welfare legislation in DANDRIDGE V. WILLIAMS, 397 U.S. 471 (197) Brief for Appellants, p. 16-17. This test is not applicable when such legislation impinges on a fundamental right. HAGANS V. LAVINE, 39 L.Ed.2d 577 (1974); UNITED STATES DEPARTMENT OF AGRICULTURE V. MORENO, 413 U.S. 528 (1973); SHAPIRO V. THOMPSON, Supra. The decision as to whether to bear a child may be the subject of state created classification only when required by a compelling interest. This has been the test applied whenever state action has interfered with the abortion decision. ROE V. WADE, Supra; DOE V. BOLTON, Supra; DOE V. ROSE, Supra; DOE V. WESTBY, Supra; DOE V. WOHLGEMUTH, Supra. All of the arguments as to compelling interest in Part III, supra, are applicable to the equal protection analysis and will not be reiterated.

As noted, neither health of the mother, concern for the fetus, nor fiscal consideration constitute a compelling interest for denying medical assistance for abortion, or for surrounding the availability of medicaid funds with administrative requirements which deter or at best delay the necessary medical treatment.

Indeed, this policy is so lacking in rationality that it fails even under the rational basis test or the inter-

mediate test adopted by the Second Circuit in GREEN V. WATERFORD BOARD OF EDUCATION, 473 F.2d 629 (1973); DOE V. ROSE, Supra. at 11.

The abortion regulation must be tested in the context of the welfare legislation of which it is a part. The broad purpose of Title XIX is to provide necessary medical services to the poor and to assist those who are ill or incapacitated to "attain or retain" their capacity for self-support. 42 U.S.C. §1396. The abortion procedures challenged herein clearly are directly contrary to the purpose of this statute since their result is to limit the ability of indigent women to become self-supporting by requiring them to bear and care for an unwanted child. In addition the requirement inevitably results in increased expense to the state and federal governments.

The prior approval issue may require a somewhat different analysis in terms of the equal protection clause, because it serves an administrative function and would not alone necessarily deny plaintiffs the right to an abortion. However, there can be no administrative rationale for imposing the prior approval requirement on abortion and on no other comparable service. Abortion is no more or less voluntary than normal childbirth, or the treatment of any other condition where a medical problem can be dealt with in more than one fashion.

When applied to abortion, moreover, the requirement effectively prevents optimum treatment, by imposing undue delay

in an emergency situation. A requirement which prohibits emergency medical care can have no rational basis when imposed as part of a remedial statute designed to assume that no citizen goes without medical care due to lack of funds. MEMORIAL HOSPITAL V. MARICOPA COUNTY, Supra.

As noted in the Statement of Facts, Supra. the only other hospital services requiring prior approval are cases where the hospital stay is over ten days. The average aboriton during the first twelve weeks does not even require an overnight hospital stay. No comparable physician's service is singled out for prior approval. Moreover, no regulation actually excludes any medical procedure from medicaid coverage. An elective abortion, however, is clearly excluded.

Defendants have therefore undertaken to provide medical care to all eligible medicaid recipients. They have then singled out that group of recipients requiring abortion and refused or restricted that particular form of care.

Plaintiffs submit that the fundamental guarantee of equal protection of the laws requires this Court to strike down the challenged policy and to require the payment of reasonable costs for abortion services since there is no ground of difference nor relationship to state interest that rationally explains the different treatment accorded poor women with respect to the availability of abortion services, as contrasted with pre-and postnatal services or with other medical services reimbursable under the state's Medical Assistance Program.

V. A THREE-JUDGE COURT IS NOT REQUIRED FOR DETERMINATION OF THE CONSTITUTIONALITY OF THE DENIAL OF MEDICAID PAYMENTS FOR ABORTION.

Plaintiffs argued below that ROE V. WADE, Supra, and DOE V. BOLTON, Supra. and cases decided subsequent thereto unequivocally render defendants' abortion restrictions unconstitutional, and any argument in support of these restrictions is so insubstantial as to obviate the need for a statutory three-judge court. BAILEY V. PATTERSON, 369 U.S. 31 (1962). This principle applies to cases where the defense is without merit, as well as to the dismissal of insubstantial causes of action. TURNER V. CITY OF MEMPHIS, 369 U.S. 350 (1962); LEVERING & GARRIGUES CO. V. MORRIN, 289 U.S. 103 (1933).

The constitutional issues were briefed and argued by both sides in the District Court and the Court's decision to enjoin §275 is based at least in part on constitutional grounds.

ROE V. WADE, Supra, and DOE V. BOLTON, Supra. are clearly authoritative decisions which forbid state action infringing the right to an abortion. No three-judge court is required in cases raising that issue. DOE V. ISRAEL, 482 F.2d 156, 158 (1st Cir. 1973). And see POE V. NORTON, No. 15,712 F. Supp. n.1 (D. Conn, Feb. 8, 1974), cf. KLEIN V. NASSAU COUNTY MEDICAL CENTER, rem. 412 U.S. 924 (1973).

In DOE V. ROSE, Supra. the 10th Circuit faced a situation directly analogous to the case at bar. The District Court had enjoined the defendants' policies on statutory and constitutional grounds; the Circuit Court affirmed on constitutional grounds alone.

Should this Court agree that it is constitutionally impermissible for a state to limit the right of medicaid recipients to reimbursement for abortion, the proper course for it to follow would be to uphold the District Court on that ground. Any other procedure would involve a needless waste of judicial and legal resources. The case would have to be remanded for the convening of a three-judge court, which would then have to hear arguments identical to those already presented to the District Judge and to this Court. Affirmance, on the other hand, would comply with this Court's policy of refusing to remand to a three-judge court when the purpose of the three-judge statute has already been served by appellate review. SEERGY V. KINGS COUNTY REPUBLICAN COUNTY COMMITTEE, 459 F.2d 308, (2d Cir. 1972); ASTRO CINEMA CORP. INC. V. MACKELL, 422 F.2d 293 (2d Cir. 1970).

> Furthermore, we cannot avoid noting that our own three-judge review, while not by a district court, does serve to satisfy the essential purpose of §2281, which was to prevent a single judge from paralyzing the enforcement of a statewide law. Since the principles governing the case are clear, to remand for the convening of a three-judge court at this stage would amount to a waste of judicial manpower. SEERGY V. KINGS COUNTY REPUBLICAN COMMITTEE, Supra. 459 F.2d at 312-13.

Neither party's right to a speedy appeal to the United States Supreme Court would be prejudiced. ASTRO CINEMA CORP. INC. V. MACKELL, Supra. at 299. Remand would only serve to delay a definitive ruling on the issues.

CONCLUSION

For all of the foregoing reasons, plaintiff-appellees respectfully request this Court of Appeals to affirm the decision of the District Court of Connecticut enjoining the defendants from enforcing §275 of the Connecticut Welfare Department, Public Assistance Manual, Volume 3, Ch. III, and from imposing any requirements on medicaid payments for abortion which, as to the first trimester of pregnancy are not equally applicable to payments for childbirth, and as to the second trimester of pregnancy, are inconsistent with the standards set forth in DOE V. BOLTON, Supra.

RESPECTFULLY SUBMITTED,

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